

**IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

**STATE OF DELAWARE,**

Plaintiff,

v.

**KEVIN P. VARRASSE,**

Defendant.

**Case No.: 1007024223**

Darryl A. Parson, Esquire  
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Department of Justice  
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**Date Submitted: June 6, 2011**  
**Date Decided: June 16, 2011**

**OPINION ON DEFENDANT’S MOTION TO COMPEL**

The Defendant has filed a Motion to Compel Discovery relating to his arrest for Driving Under the Influence. The Defendant contends that he is entitled to calibration, maintenance and “out of service” records of any scientific instrument relied upon by any State’s witness as a basis for, or in connection with, his testimony, including any Intoxilyzer. A hearing was held on Defendant’s Motion to Compel in the Court of Common Pleas, New Castle County, State of Delaware on April 28, 2011. Following oral argument, the Court reserved decision and ordered a briefing schedule on the issue.

After hearing oral arguments and reviewing the briefs of the parties and based upon this record and for the reasons stated in this Opinion, the Court **DENIES** Defendant's Motion.

### **I. Background**

On July 7, 2010, the Defendant, Kevin P. Varrasse (hereinafter "Defendant") was charged by information filed with the Clerk of the Court by the Attorney General with Driving Under the Influence, in violation of 21 *Del. C.* § 4177(a). On August 2, 2010, Defendant was arraigned in Justice of the Peace Court 11, and Defendant requested that the matter be transferred to the Court of Common Pleas. Case review was scheduled for October 27, 2010.

On August 12, 2010, the State, via e-mail, provided initial discovery to Defendant. On or about August 20, 2010, the Defendant submitted a discovery request to the State, seeking the following *inter alia*: (1) calibration, maintenance and "out of service" records of any scientific instrument relied upon by any State's witness as a basis for, or in connection with, his testimony, including any Intoxilyzer; (2) records reflecting the date that the Intoxilyzer was put into service originally by the State, and the nature and extent of any modifications to the Intoxilyzer since it was put into service; (3) records reflecting whether the Intoxilyzer has had a RFI detector installed on it, records reflecting whether such detector has been adjusted from its factory settings, and records reflecting the last date the RFI detector was last checked for proper operation; (4) records reflecting whether the Intoxilyzer has had an "Ambient Air" module installed on it, records reflecting whether such module has been adjusted from its factory settings, and records reflecting the last date the module was checked for proper calibration or calibrated.

Defendant has further requested that the State "...certify affirmatively that the Deputy Attorney General answering these discovery requests has made appropriate inquiry of the police

to determine the accuracy of its responses.” *Id.* On December 27, 2010, the State provided additional discovery, including a copy of Defendant’s pre-Intoxilyzer test surveillance video and copies of the Intoxilyzer calibration logs for the machine used in this case. The Intoxilyzer calibration logs, dated June 28, 2010 and August 2, 2010 respectively, indicated that the machine was “working properly and accurately” on both dates. The State also informed Defendant that no motor vehicle recording pertained to the case. However, the State did not provide the items requested from the Defendant nor did the State provide Defendant with the affirmative certification as requested by Defense counsel.

The case was set for trial on February 21, 2011. On the day of trial, counsel for Defendant addressed a discovery issue. The State responded in opposition on that day by contending that the Defendant’s discovery requests regarding Intoxilyzer maintenance and service records were beyond the scope of the State’s obligations pursuant to Court of Common Pleas Criminal Rule 16. The Court ordered the parties to submit briefs regarding the issue. On March 7, 2011, Defendant filed the Motion to Compel. The Motion to Compel was placed upon the Court’s Criminal Motions Calendar for April 28, 2011. Judge Welch had retained jurisdiction over this matter and on April 28, 2011, the Court continued the matter and subsequently this Judge issued a Briefing Schedule and Order on Defendant’s Motion.

## **II. Discussion**

The instant dispute is governed by Court of Common Pleas Criminal Rule 16. Court of Common Pleas Criminal Rule 16(a) (1) (C) provides:

Upon request of a defendant the State shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the State, and which are material to the preparation of the defendant’s defense or are intended for use by the State as

evidence in chief at the trial, or were obtained from or belong to the defendant.<sup>1</sup>

Further, Court of Common Pleas Criminal Rule 16(a) (1) (D) provides:

Upon request of a defendant the State shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examination, and of scientific tests or experiments, or copies thereof, which are within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the State, and which are material to the preparation of the defense or are intended for use by the State as evidence in chief at the trial.<sup>2</sup>

Case law demonstrates that the burden is on the defendant to show that the requested items are material to the preparation of his defense, specifically to “show some evidence that the requested pretrial disclosure of the disputed evidence would enable him to alter the quantum of proof in his or her favor . . . .”<sup>3</sup> Further, the defendant must show a “non-speculative basis” for the request of the documents.<sup>4</sup> The defendant must also “demonstrate that his request is reasonable.”<sup>5</sup>

Regarding the additional records sought by Defendant for the Intoxilyzer, case law in this jurisdiction makes clear that “...[t]he [only] prerequisite to introducing the result of intoxilyzer test into evidence is to present the certifications of the State Chemist that the intoxilyzer machine was operating accurately before and after testing the breath of the defendant on trial.”<sup>6</sup> Further,

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<sup>1</sup> *Court of Common Pleas Criminal Rule 16(a) (1) C*.

<sup>2</sup> *Court of Common Pleas Criminal Rule 16(a) (1) (D)*.

<sup>3</sup> *See State v. Johnson*, 2001 WL 34083582 at \*3 (Del. Super. Ct. Apr. 27, 2001).

<sup>4</sup> *U.S. v. Garcia*, 2001 WL 173784 at \*3 (D. Del. Feb. 13, 2001).

<sup>5</sup> *State v. Traenkner*, 314 A.2d 202, 204 (Del. Super. Ct. 1973).

<sup>6</sup> *McConnell v. State*, 639 A.2d 74, 1994 WL 43751 at \*1 (Del. Feb. 3, 1994); *Anderson v. State*, 675 A.2d 943, 944-45 (Del. 1996).

“general allegations as to the materiality and reasonableness of his request are simply not adequate.”<sup>7</sup>

This Court in *State v. McCurdy*<sup>8</sup> denied a defense request for production of additional Intoxilyzer records, specifically records concerning service, modifications and calibrations checks on the Intoxilyzer on the grounds that the Defendant had not shown that the records were material to his defense. The Court held that the Defendant’s request was overbroad and unduly burdensome and that Defendant’s request “delve[d] far deeper into the maintenance and calibration of the intoxilyzer than the standard set forth in *Anderson*.”

Defendant has failed to propose a material reason for the request of additional calibration records. Defendant has also failed to articulate that the additional Intoxilyzer records would alter the quantum of proof in his favor. There is simply no specific claim asserted by Defendant as to the materiality of the records sought other than the additional records are discoverable because the test for materiality is one of “may be” rather than “definitive” materiality. Further, the Defendant has the opportunity to cross examine the State’s qualified witness at trial as to the accuracy of the results. The State has provided Defendant with the Intoxilyzer calibration logs and the defendant has failed to articulate a reason for the relevance of additional records and/or materiality to Defendant’s defense.

Further, as the State correctly asserts, when performing an analysis of an individual sample, the Intoxilyzer machine performs an internal standards check prior and subsequent to the subject test. On that issue, this Court has held that “the internal standards check is a means

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<sup>7</sup> *Traenkner*, 314 A.2d at 204.

<sup>8</sup> *State v. McCurdy*, 2010 WL 546499 (Del. Com. Pl. Feb. 3, 2010).

whereby the instrument performs an ‘internal’ check to verify the instrument is within calibration.”<sup>9</sup>

Defendant’s reliance upon *DeBerry v. State*<sup>10</sup> is inapplicable. *DeBerry* involved items that the Defendant and a State’s witness reasonably believed to be in the custody of the State. The Court held that the State’s “duty of disclosure attaches in some form once the Government has first gathered and taken possession of the evidence in question.”<sup>11</sup> This Court has not received any indication to suggest that the additional records exist and that the State has custody of such records. The State is under “no duty to seek out all possible inculpatory or exculpatory evidence.”<sup>12</sup>

Defendant further requests that the State certify affirmatively that the Deputy Attorney General answering Defendant’s discovery requests has made appropriate inquiry of the police to determine the accuracy of its responses.

Defendant argues that discoverable materials such as dashboard videos and Intoxilyzer room videos are sometimes turned over to the defense on the day of trial. The Court finds this argument to be without merit. In this case, the State provided the Defendant with a copy of the Defendant’s Intoxilyzer room surveillance video by letter dated December 27, 2010 and informed Defendant that no motor vehicle recording was applicable to the case.

Defendant cites to *Johnson v. State*<sup>13</sup> and *Ray v. State*<sup>14</sup> to stand for the proposition that the State’s discovery obligations extend to material in the custody of any law enforcement agency which is taking part in the investigation and that the State has a duty to make inquiry of

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<sup>9</sup> *State v. Vickers*, 2010 WL 2299001 at \*9 (Del. Com. Pl. June 9, 2010).

<sup>10</sup> *DeBerry v. State*, 457 A.3d 744 (Del. 1983).

<sup>11</sup> *Id.* at 751.

<sup>12</sup> *Mason v. State*, 963 A.2d 139 (Del. 2009).

<sup>13</sup> *Johnson v. State*, 550 A.2d 903, 911 n.6 (Del. 1988).

<sup>14</sup> *Ray v. State*, 582 A.2d 439 (Del. 1991).

the police to determine the existence of discoverable material. The Court agrees with Defendant's recitation of the aforementioned case law. However, these cases do not require the State acting through a Deputy Attorney General to certify affirmatively whether the Deputy Attorney General has made appropriate inquiry of the police regarding discovery.

The State has provided the Intoxilyzer room surveillance video as well as the calibration logs for the machine to the Defendant and supplemented that discovery response by stating that if, prior to or during trial, additional material or evidence which is subject to disclosure is discovered, it will be disclosed in a timely fashion.

Further, if the Court were to find a discovery violation, appropriate remedies exist under *Court of Common Pleas Criminal Rule 16(d) (2)* rather than Defendant's proposed remedy of affirmative certification by the Deputy Attorney General.

Based upon the foregoing reasons and analysis discussed supra, Defendant's Motion to Compel is hereby **DENIED**.

The Court Clerk is hereby directed to reschedule this matter for trial with notice to counsel of record.

**IT IS SO ORDERED** this 16<sup>th</sup> day of June 2011.

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John K. Welch  
Judge

/jb  
cc: Ms. Juanette West, Scheduling Supervisor  
CCP, Criminal Division